1992

Commercial Union Associates v. John N. Clayton, David N. Clayton, and T. Scott Lindley as Clayton Plastic Surgery Specialists, and Clayton Plastic Surgery Associates : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

COMMERCIAL UNION ASSOCIATES, a Utah general partnership,	:	
Plaintiff and Appellee,	:	CASE NO. 920335CA Priority No. 16
vs.	:	
JOHN N. CLAYTON, DAVID N. CLAYTON, and T. SCOTT LINDLEY, jointly doing business as CLAYTON PLASTIC SURGERY SPECIALISTS, and CLAYTON PLASTIC SURGERY ASSOCIATES, a Utah corporation,	:	(THIRD DISTRICT COURT NO. 890902885CN)
Defendants and Appellants.	:	

APPELLEE'S BRIEF

Appeal taken from the Judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, The Honorable James S. Sawaya, District Court Judge

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JURISDICTION

Rules 3, 4 and 42 of the Utah Rules of Appellate Procedure and Section 78-2a-3, Utah Code Annotated (1953, as amended), confer jurisdiction on this Court to hear this appeal.

ISSUES PRESENTED FOR REVIEW

I. DID CPSS PROPERLY MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS BEFORE ATTACKING THOSE FINDINGS? CPSS must marshal all evidence in support of the trial court's findings of fact and demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. Saunders vs. Sharp, 806 P.2d 198,199 (Utah 1991). The appellate court will not second-guess the trial court where there is a reasonable basis to support its findings. Utah Rules of Civil Procedure 52(a); Reed vs. Reed, 806 P.2d 1182,1184 (Utah 1991).

II. DOES THE STATUTE OF FRAUDS BAR THE LEASE? Utah Code Sections 25-5-3 and 4 require leases for more than one year to be in writing, but Section 25-5-8 allows leases to be established by part performance. If partly performed, a verbal agreement, despite the requirements of the statute of frauds, will be enforced by a court of equity. Barker vs. Francis, 741 P.2d 548 (Ut.App. 1987). The principles of equity and justice apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice. Williamson vs. Wanlass, 545 P.2d 1145 (Utah 1976).

III. DID CPSS RATIFY THE LEASE AGREEMENT? Where all parties, including non-signers, by their actions recognize the validity of

an agreement and acquiesce in its performance, the contract is valid. Ercanbrack vs. Crandall-Walker Motor Co., 550 P.2d 723 (Utah 1976).

IV. ARE ANY CONDITIONS PRECEDENT TO THE LEASE NOT YET FULFILLED? Typed words take precedence over printed words in construing a contract. Holland vs. Brown, 15 Utah 2d 422, 394 P.2d 77 (1964). The court must look at the entire lease contract as a whole in order to give proper construction to the lease. Mark Steel Corporation vs. Eimco Corporation, 548 P.2d 892 (Utah 1976). A party's true intent can be shown by its actions. Plateau Mining Co. vs. Utah Division of State Lands, 802 P.2d 720 (Utah 1990).

V. CAN THE GUARANTORS BE LIABLE AS PRINCIPLES? Where a guaranty is an unconditional promise, the promise creates a primary obligation of the guarantor. Kintner vs. Wolfe, 102 Ariz. 164, 426 P.2d 798 (1967).

VI. WAS THERE A LACK OF MUTUAL ASSENT OR A MEETING OF THE MINDS? The unexpressed intentions do not affect the validity of a contract; the mutual assent of the parties must be gathered by a party's words and acts. Jaramillo vs. Farmer's Insurance Group, 669 P.2d 1231,1233 (Utah 1983).

VII. WAS THE LEASE IMPOSSIBLE TO PERFORM OR FRUSTRATED IN PURPOSE? An obligation is deemed discharged if an unforeseen event occurs after formation of a contract without fault of the obligated party, which events make performance of the obligation impossible or highly impracticable. Western Properties vs. Southern Utah Aviation, 776 P.2d 656,658 (Ut.App. 1989; emphasis added.)

VIII. WAS PAROLE EVIDENCE IMPROPERLY ADMITTED? Parole evidence is admissible in an action to reform a lease to show the parties' intentions. Maytime Manor, Inc. vs. Stokermatic, Inc. 597 P.2d 866 (Utah 1979). Evidence is not parole evidence and is admissible where it does not contradict the writing but merely explains the transaction. Zeese vs. Estate of Siegel, 534 P.2d 85,88 (Utah 1975).

IX. SHOULD THE LEASE BE REFORMED? Reformation is appropriate where the written instrument is not in conformity with the parties agreement or where it is necessary to reflect the intent of the parties. Grahn vs. Gregory, 800 P.2d 320 (Ut.App. 1990).

X. IS CPSS ESTOPPED FROM DENYING THE VALIDITY OF THE LEASE? Where CPSS failed to brief an issue, the point is waived. Pixton vs. State Farm Mutual Automobile Ins. Co., 809 P.2d 746,751 (Ut.App. 1991). Estoppel requires proof of a statement, admission, act or failure to act by CPSS inconsistent with a later-asserted claim; CUA's reasonable reliance based on such statement, admission, act or failure to act; and injury to CUA if CPSS is allowed to repudiate its statement, admission, act or failure to act. Brixon & Christopher Architects vs. Elton, 777 P.2d 1039 (Ut.App. 1989).

XI. IS CPSS ENTITLED TO RECOVER DAMAGES? If CPSS proves no damages, or proves no breach by CUA, it may not recover any damages.

DETERMINATIVE STATUTE

Section 25-5-8, Utah Code Annotated (1953, as amended),

provides as follows:

> Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

This statute, together with case law, is determinative of this case.

STATEMENT OF THE CASE

Plaintiff and Appellee Commercial Union Associates, a Utah general partnership (hereinafter refered to as "CUA"), brought an action in the Third District Court in and for Salt Lake County, State of Utah, against defendants and appellants John N. Clayton, David N. Clayton, T. Scott Lindley (each of whom is a plastic surgeon and who are jointly referred to as "the doctors") and Clayton Plastic Surgery Associates, a Utah corporation doing business as Clayton Plastic Surgery Specialists (hereinafter referred to as "CPSA"; defendants and appellants are all jointly referred to 1hereinas "CPSS"). CPSA is wholly owned by John L. Clayton, also a plastic surgeon and father of John N. Clayton and David N. Clayton. John L., John N. and David N. are officers, directors and employees of CPSA. Dr. Lindley's professional corporation T. Scott Lindley, M.D., P.C., had a partnership-like arrangement with CPSA and worked in the CPSA dba CPSS plastic surgery practice.

Following a bench trial before the Honorable James S. Sawaya, District Court Judge, a judgment was entered in favor of CUA and against each of the defendants, jointly and severally, on November 19, 1991. From this judgment, the doctors and CPSA have appealed.

STATEMENT OF FACTS

Plaintiff-Appellee Commercial Union Associates is a Utah general partnership which owns and manages a commercial office building located in Salt Lake County at 1275 East Fort Union Boulevard. (Record, hereafter "R", 1434; Findings of Fact, hereinafter "FF", 1; note: the Findings of Fact are found in the Record at pp. 850-865). In 1988 the building contained medical offices with two (2) surgical operatories built out at great expense by Blue Cross-Blue Shield (hereinafter called the "U-Care space"; R 1289; FF 6). CUA had a valid certificate of occupancy for the entire building, including the U-Care space, in the summer and fall of 1988. (R 1435; FF 8).

Defendants-Appellants Clayton Plastic Surgery Associates dba Clayton Plastic Surgery Specialists was a plastic surgery business. The individual defendants worked as plastic surgeons for CPSS. John N. Clayton ("JNC"), David N. Clayton ("DNC"), and John L. Clayton ("JLC") are officers and directors of CPSS. (R 1211; FF 2).

CPSS desired to move into larger space, and the individual doctors began to look for new office space. T. Scott Lindley (hereinafter "TSL") made contact with Lee Teerlink, a leasing agent in the Union Park area of Salt Lake County. (R 1281; FF 4,5). In discussion of the needs of CPSS, TSL told Mr. Teerlink that there were two levels of certification for medical offices, but that CPSS did not want the higher level of certification. (R 1322; FF 15). Mr. Teerlink met with some of the other doctors, as well as with appellant's attorney Brad Bearnson. (R 1022,1291,2137; FF 12).

Mr. Bearnson did not know what B-2 or I-occupancy certifications meant, and these certification levels were never discussed in any negotiations. (R 1715; FF 12). Mr. Bearnson never discussed Medicare or Medicaid during the lease negotiations process. (R 1333). CPSS also had Brent Armstrong, a second attorney, review the lease agreement. (R 1222-1223). The final lease agreement does not anywhere state that I-occupancy certification or Medicare or Medicaid qualifications were necessary. (Ex. 4,11; R 1484). CPSS acknowledged that the leased premises were already built out as medical space at the time of lease negotiations. (R 1242).

Mr. Teerlink showed TSL at least two buildings, including a building known as UPIII and the U-Care space in the CUA building. (R 1282,1285; FF 6). Mr. Teerlink, at the request of CPSS, prepared a letter which compared the relative costs of building out a medical facility in each building. (Ex. D-2; R 1287; FF 9). The costs were based on the buildout costs for the U-Care space for comparison purposes. (R 1288). CPSS submitted to CUA a financial statement in order to show credit worthiness to become a lessee. (R 1304-1305; FF 27).

On September 23, 1988, Joel Madsen (the contractor hired by CPSS), Bill Nelson (an architect), TSL and JNC met at the CPSS offices. At that meeting, Mr. Nelson told CPSS that buildout costs would be at least $80.00 per square foot. (R 1050,1053,1075,1143; FF 16). As of this date CPSS still had not decided what type of occupancy it wanted (R 1055-6,1081,1145,1174; FF 16), but JNC said CPSS wanted the same type of certification it had in its current

facility. (R 1147). On September 27, 1988, JLC, president of CPSS, executed an agreement with Bill Nelson's architectural firm to design the buildout for the premises CPSS intended to lease from CUA. (Ex. 8; R 1056-1057,1216-1217; FF 17).

Two days later, on September 29, 1988, JLC went to Mr. Teerlink's offices and executed a lease agreement whereby CPSS leased office space from CUA. (R 1212,1213,1294; FF 18). JLC as the CPSS president intended to bind CPSS as the lessee by his signature on the lease. (Ex. 4; R 1214; FF 18). JLC also delivered to Mr. Teerlink at that time the check for the first month's lease payment. (Ex. 5; R 1294; FF 18). The check was a CPSS check executed by a CPSS officer. (Ex. 5; R 1215; FF 18).

CUA did not accept the lease as signed because CUA required the lease to be executed by the doctors individually as guarantors. (R 1297,1439,1440; FF 19). A new lease was taken to CPSS by Mr. Teerlink. (R 1298; FF 19). On October 17, 1988, Mr. Teerlink picked up the lease agreement (Ex. 11) which had been signed by the individual doctors and delivered it to CUA. (R 1298; FF 20). The signatures of the individual doctors contain no conditions whatsoever (except for the length of the term of the guarantee, which is not at issue in this lawsuit) (Ex. 11; FF 20,21). On October 18th, CUA deposited the CPSS check for the first month's lease payment in its account. (R 1384; FF 22). Two of the signers of the lease were CPSS officers and directors. (R 1211).

On October 18th, Bill Nelson wrote to CPSS and requested clarification as to the type of certification desired by CPSS.

(Ex. 24; R 1062,2137; FF 23). On October 20th, one of the doctors called Mr. Nelson and said CPSS wanted I-occupancy certification (R 1064, Ex. 25; FF 24). On November 14th, Joel Madsen (CPSS' contractor) wrote to CPSS and gave a projected time line for completion of the buildout. (Ex. 59; R 1149,1181,1183; FF 25). CPSS never at any time complained about the time schedule. (R 1149,1181; FF 25).

Each of the parties intended that CPSS be the lessee. (R 1255, 1256; FF 26). The parties believed that CPSS had signed the lease agreement. (R 1255,1546; FF 26). The day after the lease was signed, TSL called Blaine Savage (property manager for CUA) and expressed appreciation that the lease was finally completed. (R 1443; FF 28). CUA believed that CPSS was the lessee (R 1581; FF 26).

CPSS intended to use the CUA premises for a clinic and examination rooms, and to construct a surgical operatory there for its plastic surgery practice. (R 1247,1248).

CPSS was given keys to the CUA premises and the doctors periodically went to the premises. (R 1220,1235; FF 27).

CPSS communicated regularly with the architect in order to make decisions during the design and certification process. (Ex. 18-20,23-29,31,32,34-41,43-47; R 1071,1231,1232; FF 31). CPSS was invoiced by the architect for designing the buildout, and CPSS paid the architect for the design work in a sum approximating $20,000. (R 1058,1066,1067,1070-1072,1080; FF 31). Payments to the architect were made by CPSS checks signed by CPSS employees. (R

1058,1071,1072, 1080; FF 31). Architectural services and payments therefor continued long after the lease was signed. (Ex. 9,27,37,44-47,49,50; R 1058,1071,1072,1080).

CPSS through TSL had prior experience with medical construction and certification. (R 1237; FF 31). CPSS had purchased a binder containing all of the certification requirements. (R 1024; FF 31). CPSS corresponded with the State of Utah directly or through CPSS' architects as part of the certification process. (Ex. 52,54,55; FF 32).

As part of the certification process, CPSS was required to submit to the State Health Department a narrative, an application and a $1,500 fee. CPSS never completed the I-occupancy application or submitted it to the State. (R 1107; FF 52). CPSS never paid the $1,500 application fee. (R 1107; FF 52). CPSS never prepared the required narrative, although both CPSS' architects and the State Health Department requested CPSS to prepare the narrative on several occasions. (Ex. 32,39,40, 43,52,54; R 1102,1104,1107,1237; FF 52). It was not the responsibility of CUA to prepare the narrative or make I-occupancy application to the State. That duty lied with CPSS. (R 1091,1114).

Preliminary approval for I-occupancy certification was obtained for the CPSS buildout from the State fire marshal and the health review board. (R 1094,1103,1104; FF 53). CPSS' architect testified that it is not unusual to place an I-occupancy facility in an existing building (R 2138,2139,2142; FF 54), and that it was very likely that I-occupancy could be obtained for the CUA leased

premises. (R 1108,1109,2139,2140; FF 54). This could be done by creating an I-occupancy "bubble" within the existing building, giving CPSS the required fire protection. (R 2138,2139; FF 53). Although CPSS never asked for additional space (R 1485), CPSS could have had more space if it so desired in order to satisfy certification requirements. (R 1485,1587).

CPSS also hired a general contractor, TCM Corporation (Joel Madsen is the TCM president) to perform demolition services and to build out new operatories in the leased premises. (R 1167; Ex. 57,59; FF 33). TCM corresponded regularly with CPSS in writing and by telephone regarding demolition and buildout matters. (Ex. 57,59,62-69; R 1152-1157,1168; FF 34). Joel Madsen met with Blaine Savage of CUA in order to obtain approval for certain modifications of the CUA building for CPSS, such as moving a column and creating new exterior doors. Such approval was required by the lease agreement. (Ex. 11 [Sec. 7, Para. 3], 59; R 1441,1442,1591; FF 34).

On November 22, 1988, TSL told Joel Madsen to proceed with demolition of the operatory areas of the CUA premises. (R 1150, 1152; Ex. 57; FF 35). The lease term began on December 1, 1988. (Ex. 11; R 1441; FF 35,37). Shortly thereafter TCM demolished a portion of the CUA building pursuant to CPSS' instructions. The demolition took out existing offices with carpeting, oak paneling, electrical systems, HVAC systems, the ceiling, and everything else down to the concrete floors, ceiling and glass walls. (R 1152, 1442,1443). The demolition rendered a substantial portion of the

CUA premises completely unusable. (R 1152; FF 35).

In addition to demolition work, TCM sent out a request for bids. (Ex. 62-69; R 1153; FF 39). After negotiations requested by CPSS, the total bid was reduced to $284,523, a cost of $38.98 per square foot for nearly 7300 square feet of medical space, including two I-occupancy surgical rooms. (Ex. 69; R 1156; FF 39). CPSS paid TCM for the demolition work with a CPSS check signed by a CPSS officer. (Ex. 81; R 1166,1167; FF 38).

Shortly after the lease was signed, TSL called Mr. Savage to enlist his help for CPSS to obtain a loan to build out the leased premises. (R 1442). CPSS contacted several financial institutions for potential loans in order to build out the CUA premises. (Ex. 84,91,92,94; R 1228,1229,1242,1248; FF 43). CPSS actually applied for a loan at Valley Bank in the sum of $300,000 (FF 43). DNC told Paul Sommer, the Valley Bank loan officer, that the money was to be used for leasehold improvements in the CUA offices. (R 1187,1188,1197,1204; FF 43). Valley Bank said that construction work had to be done on the CUA premises before the bank would make loan disbursements. (R 1205,1208).

Valley Bank issued a loan commitment to CPSS in the amount of $300,000 for the purpose of financing leasehold improvements in the CUA building. (R 1192,1199; FF 44). The borrowers under the bank loan were the same parties under the lease: CPSS, JNC, DNC and TSL. (Ex. 94, R 1190).

CPSS purchased equipment for the CUA premises after the lease was signed. (R 1241,1246; FF 40). CPSS purchased stationery and

envelopes showing the CUA address as the return address. (R 1221-1222; FF 41). CPSS made arrangements with INI, Incorporated to have the CPSS computer moved to the CUA building. (R 1250; F 42).

CPSS made lease payments to CUA for five months. The checks for the lease payments were drawn on a CPSS corporate account (except for the 1/3 payment made by TSL in April of 1989) and corresponded with the lease payments required in the written lease agreement (Ex. 5,11-16; R 1217-1220,1264-1265; FF 45). Except for the initial payment, the checks were written after the construction bids were received and CPSS knew the actual cost of the buildout. (R 1265; FF 45). The checks themselves say that they are for lease payments and do not mention month-to-month rental payments. (Ex. 5, 12-16).

In March of 1989 TSL left CPSS and opened his own plastic surgery practice near Alta View Hospital. (R 1263; FF 49). TSL told Lee Teerlink and Blaine Savage in an April 1989 meeting at TSL offices that he left CPSS because the Claytons had not performed several promises they made to him and that the relationship didn't work out. (R 1147,1451,2152; FF 49). As a result of TSL's leaving CPSS, DNC notified Valley Bank that because TSL left CPSS, CPSS no longer needed the $300,000 loan. (Ex. 93; R 1191,1194,1199, 1200,1202,1203; FF 51).

At the April 1989 meeting in his offices, TSL acknowledged to Lee Teerlink and Blaine Savage his obligation under the lease agreement. (R 1307,1449,1450; FF 50). But CPSS failed to make the monthly lease payments to CUA beginning in May of 1989. The lease

payments total $8,611.42 per month. (Ex. 11; R 1475,1476; FF 56).

During the course of the negotiations, Lee Teerlink was not the listing agent for the CUA premises. (R 1295; FF 48). Mr. Teerlink did not act as the agent of CUA, but acted as agent for TSL and CPSS. (R 1339,1340; FF 46,47,48).

CPSS knew that when it entered into the lease agreement with CUA it would be taking the premises of current CUA tenants with long-term leases which were paying lease payments to CUA. (R 1296,1439,1440,1552,1559,1560; FF 29). In order to obtain the space desired by CPSS, CUA needed to release tenants from their respective lease obligations in order for the CPSS space to be available. (R 1481-1484,1559,1560; FF 30). CUA released $196,000 in lease payments after the CPSS lease was signed. (R 1565; FF 7,29). CUA had no obligation to the existing tenants to release them (R 1590), but relied on the existence of the CPSS lease and released them. Before CUA released those tenants, it had received a lease containing the signatures of principals of CPSS, had received the first month's lease payment, knew that CPSS hired an architect and contractor to perform the buildout, and received a telephone call from TSL indicating that the lease negotiations had finally been concluded. (R 1563; FF 30).

Because of the demolition to the CUA premises by CPSS and CPSS' failure to make lease payments beginning May 1, 1989, CUA suffered damages totalling $242,533.56. (R 1479; FF 62; Ex. 147). In addition, pursuant to the lease agreement, CUA incurred reasonable attorney's fees as of the time of trial in the sum of

$49,781.50. (R 667-672,1484,1602,2158; FF 63; Ex. 153). Those attorney's fees continue to accrue to this date.

CUA mitigated its damages by trying to find new tenants to lease the premises which had been leased by CPSS. (R 1452-1469; FF 55,57,59). CUA put signs and banners on the CUA building, and sent out flyers with photographs of the building and the U-Care space to over 400 medical practitioners in Salt Lake County to advertise the space. (R 1455,1456,1463,1464,1469; FF 55). CUA contacted several lease brokers on a regular basis to attempt to relet the premises. (R 1452,1453; FF 55). Lee Teerlink, at the request of TSL, attempted to relet the premises. (R 1452). Several referrals were pursued. (R 1452,1453a). Finally a new tenant was obtained in the spring of 1990 to take the place of CPSS. (R 1454,1469a-1471; FF 58,61; Ex. 133,137,144). CUA took all reasonable steps it could to try to mitigate its damages.

CPSS attempted to claim damages in the trial court. Those damages are inappropriate because the trial court found that CUA did not breach the lease agreement, and are inadmissible because they are speculative and not based on facts in evidence. CPSS' damage calculations were based on I-occupancy. But CPSS had never operated an I-occupancy surgical center before. (R 2129). Claimed overhead expenses were based on unrelated hospital expenses, not on CPSS actual expenses. (R 2119,2120,2122). Income taxes and fixed costs such as tools, equipment, increased rent and utilities costs were not considered in determining net profit. (R 2127-2129,1131). TSL's taking several CPSS patients when he left CPSS was not

considered. CPSS' expert assumed certain employee benefit costs without ever checking actual CPSS benefits costs. (R 2125,2126).

SUMMARY OF ARGUMENTS

I. CPSS has failed to marshal the evidence in favor of the findings of fact, and has failed to show that the evidence clearly preponderates against them. The court must assume that the record supports the trial court's findings of fact and that such findings are valid.

II. The statute of frauds does not bar the lease. Substantial part performance by CPSS validates the lease. Equitable principles apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice.

III. CPSS has ratified the lease agreement by its acts and words by paying rent, demolishing a portion of the premises, and acknowledging the lease and by doing other acts indicating its intention to validate the lease.

IV. I-occupancy certification, commencement of the lease, the signature of CPSS, and a buildout cost of $44.00 per square foot are not unfulfilled conditions preventing the lease from being binding on CPSS.

V. The individual doctors executed unconditional and absolute guarantees of the obligation of CPSS, and are liable as principals on the lease.

VI. There was a meeting of the minds with respect to the identity of the lessee (CPSS), the term of the lease (5 years, beginning December 1, 1988), and what would happen if buildout

costs exceeded $44.00 per square foot (the lease would be valid), so that the parties mutually assented to the lease.

VII. The lease was not impossible to perform or frustrated in purpose because performance was completely in the hands of CPSS who is not without fault.

VIII. Parole evidence is admissible to explain a transaction where it does not contradict the written lease, and is admissible in this action to reform the lease to show the parties' intentions.

IX. The lease should be reformed so that CPSS executes the lease in accordance with the parties' intentions.

X. CPSS is estopped by its words and actions from denying the validity of the lease agreement.

XI. CUA did not breach the lease agreement and CPSS is not entitled to recovery of any damages. CPSS did not object to CUA's evidence of damages, and the judgment of the trial court should be affirmed.

ARGUMENTS

I. FAILURE TO MARSHAL EVIDENCE IN SUPPORT OF FINDINGS

Throughout its brief, CPSS seeks to support its arguments with factual allegations which are contrary to the findings of the trial court (see Exhibit B of Appellant's Brief). CPSS seeks to substitute facts supporting its version of the case rather than to use those found by the Court.

An appellate court does not lightly disturb the findings of fact made by a trial court. If a challenge is made to those

findings, CPSS must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. Saunders vs. Sharp, 806 P.2d 198, 199 (Utah 1991). CPSS has failed to marshal the evidence in favor of the findings of fact, and has failed to show that the evidence clearly preponderates against them.

If CPSS fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court, and the findings are accepted as valid. Saunders vs. Sharp, supra at 199.

In this appeal CPSS must either accept as correct all of the factual findings of the court below and all the evidence supporting those findings and attack the ruling as a matter of law, or it must demonstrate that a pivotal factual finding is without support. CPSS has not properly done either. CPSS failed to take as correct the findings of fact. Instead, it substituted "facts" favorable to its own position in hopes of using those supposed facts to win the case. Using those alleged facts which the trial court found were not the facts of the case, CPSS tried to show the trial court's legal reasoning was improper.

Some of the facts were disputed at the trial. Frequently the testimony of witnesses was diametrically opposed to that of other witnesses. But the trial court had the opportunity and duty to consider the credibility of each witness, including experts, and draw a conclusion as to which facts should be believed. The

appellate court will not second-guess the trial court where there is a reasonable basis to support its findings. Findings will not be set aside unless they are clearly erroneous. Utah R.Civ.P. 52(a); Reed vs. Reed, 806 P.2d 1182, 1184 (Utah 1991).

If CUA can show that the legal conclusions drawn by the trial court are proper based on the findings of fact, where CPSS has failed to meet its burden of review, then this appeal should fail and the judgment of the trial court must be affirmed.

II. STATUTE OF FRAUDS DOES NOT BAR LEASE

Admittedly the lease agreement which is the subject of this appeal is subject to the statute of frauds where it is for the leasing of real property for longer than one year. Section 25-5-3,4, Utah Code Annotated (1953, as amended). But even though the signature of CPSS is claimed to not be on the lease, the lease is still valid. CUA has shown several bases on which the trial court could find that the lease is valid. If CUA prevails on any one (1) of those bases, the judgment must be affirmed.

There are many limitations on the statute of frauds. One is the rule of part performance:

> Nothing in this chapter contained [the statute of frauds chapter] shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof. Section 25-5-8, Utah Code Annotated (1953, as amended).

In its brief CPSS cites cases to support the view that part performance is not available to CUA in this case. Baugh vs. Darley, 112 Utah 1,185 P.2d 335 (1947) is claimed by CPSS to stand for the principal that part performance is not available to take

oral contracts out of the statute of frauds. By taking this view CPSS ignores the plain language not only of the case but also of the statute cited above. Baugh and other cases cited by CPSS stand for the principal that part performance is not available in an action at law for money damages. 112 Utah at 5, 184 P.2d at 337. Here CUA sought specific performance of a lease. This is an action in equity, and part performance is available to CUA. Part performance is available even though CUA is a leasor. Barker vs. Francis, 741 P.2d 548,533 (Ut.App. 1987).

CUA's complaint seeks for an order that CPSS pay all lease payments, pay for demolition of the CUA building by CPSS and/or its contractor, and pay for the costs to CUA to mitigate its damages, all in specific performance of provisions of the lease agreement. See Ex. 4,11; R 343-348. This action is essentially an equitable action.

In addition, CPSS ignores Rule 2 of the Utah Rules of Civil Procedure, which provides, "There shall be one form of action to be known as 'civil action'." There is no longer a separation of actions so that equitable issues are tried to a court of equity, and legal issues are tried to a court of law. The Utah Supreme Court has stated:

> ...The rules of equity arose as a means of avoiding or ameliorating the rigidities and harshness of some of the rules and remedies of law. It is also to be observed that the differences between law and equity are not so distinct as they were in former times. The lines between them have become blurred and they have become for the most part blended together in what we refer to generally as equity and justice...

Consistent with the foregoing, equitable claims or

> defenses may be asserted and tried along with or against legal claims or defenses in the same action; and equitable principles may be applied in an action at law....The principles of equity and justice are universal; they apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice. Williamson vs. Wanlass, 545 P.2d 1145,1148 (Utah 1976).

It would be a manifest injustice and a great oppression on CUA if CPSS is now allowed to repudiate the lease. As the evidence plainly shows and the trial court found, CPSS acted as though the lease was valid. CPSS spoke as though the lease was valid. To allow CPSS to ignore the lease would cause CUA to lose $196,000 in released lease payments, and to bear the substantial cost of rebuilding the premises which CPSS demolished. Part performance is an appropriate remedy for CUA in this case, and allows the court to conclude that a valid lease exists between the parties.

The issue then becomes whether there has been performance by CPSS to bring the lease out of the statute of frauds. The trial court found adequate performance. CPSS worked with Bill Hall, an architect, to design a buildout of the CUA space for CPSS. CPSS subsequently hired a second architect, Bill Nelson, and entered into a contract with his architectural firm to design a buildout of the CUA premises. The contract with the architect was signed by John L. Clayton as president of CPSS. CPSS communicated regularly with the architect. CPSS paid the architect for his services with CPSS corporate checks signed by a corporate officer.

On September 29, 1988, CPSS through its president John L. Clayton executed a written lease agreement with CUA. CPSS also delivered the initial lease payment to CUA in the form of a CPSS

check signed by its officer. CUA would not accept the lease because it had no personal guarantors. The guarantors subsequently executed a written lease agreement identical to that signed by CPSS and delivered it to CUA. Both CPSS and the guarantors intended to be bound by the written lease agreements. CPSS never asked for the return of the check for the initial lease payment, but continued to make lease payments for several months. The lease payments did not stop until after TSL left the CPSS practice and opened his own office.

The parties believed the lease had been signed by CPSS. CPSS had keys to the CUA premises and periodically visited the premises.

CPSS hired a contractor, TCM Corporation, to demolish a portion of the premises. CPSS corresponded regularly with the contractor regarding both the demolition and buildout of the premises. TCM met with CUA to obtain approval for certain needed modifications of the building, as required by the lease. After the commencement of the lease term on December 1, 1988 (see discussion below), CPSS' contractor demolished a significant portion of the leased premises in preparation of the buildout for CPSS. This demolition rendered that portion of the premises unusable. CPSS paid TCM for its demolition work. TCM also obtained bids for the buildout of the CUA premises.

CPSS purchased equipment for the CUA premises. CPSS purchased stationery and envelopes with the CUA return address. CPSS made arrangements to have its computer moved to the CUA leased premises.

CPSS took out a $300,000 loan from Valley Bank in order to

finance the leasehold improvements in its new offices at the CUA building. The $300,000 loan corresponded to the amount of the bids for construction of the buildout.

CUA performed its obligations under the lease, and did not interfere in CPSS use of the lease premises. Until after TSL left the CPSS practice, CPSS acted in all ways as though the lease was valid and binding on it.

TSL acknowledged his guarantor obligation under the lease agreement, even after he left the CPSS practice.

All of these facts clearly show substantial and intentional performance by CPSS, taking the lease out of the statute of frauds and making it binding on CPSS through the doctrine of part performance.

III. CPSS RATIFIED LEASE

The general rule is that where a contract has been executed by only a portion of the parties to be bound thereby it is not valid. But where all parties, including the non-signers, by their actions recognize the validity of the agreement and acquiesce in its performance, the contract is valid. In Ercanbrack vs. Crandall-Walker Motor Co., 550 P.2d 723 (Utah 1976), the Utah Supreme Court stated:

> It is fundamental contract law that the parties may become bound by the terms of the contract even though they did not sign the contract, where they have otherwise indicated their acceptance of the contract, or led the other party to so believe that they have accepted the contract....This is a sound principle of contract law....550 P.2d at 725.

As stated above, there is ample evidence of ratification of

the lease by CPSS. It took possession of the leased premises, demolished a substantial portion of the premises in preparation for a buildout, made arrangements to move its practice to the premises, and made lease payments for several months. Everything it did up to the time it failed to make the May 1, 1989, lease payment indicated that it believed and acted as though the lease was fully binding on it.

IV. NO UNFULFILLED CONDITIONS PRECEDENT

CPSS claims that several conditions precedent are unfulfilled, and the lease is therefor not binding on CPSS. Those claimed conditions are that I-certification has not been obtained, that the lease had not commenced, that CPSS did not sign the lease, that occupancy was to occur shortly after Thanksgiving, and that buildout costs would not exceed $44.00 per square foot.

I-certification is not mentioned anywhere in the lease agreement. Ex. 4,11. There was no discussion during lease negotiations that I-occupancy certification was required by CPSS. The doctors had never heard of I-occupancy certification until after they signed the lease. No request for I-occupancy was made until after CUA and the doctors signed the lease.

CPSS cites Jones vs. Acme Building Products, Inc., 452 P.2d 743 (Utah 1969) and other cases for the proposition that the court cannot ignore or modify conditions which are clearly expressed. I-certification is not clearly expressed as a condition. Not only is it not expressed at all in the lease, but it was also not mentioned in lease negotiations.

The lease (Ex. 11) provides that the lessor (CUA) warrants that tenants' (CPSS) anticipated use is lawful or permitted or not in violation of zoning, etc. According to the lease in Section 6, page 2, CPSS' anticipated use was for a medical office and surgery center. The leased premises had a valid certificate of occupancy which allowed medical offices and a surgery center as of the date the lease term began and CPSS took possession of the leased premises. Where I-occupancy is not mentioned in the lease agreement and the premises already contained medical offices with two surgical operatories, CUA's warranty concerning lawfulness of use was carried out as required by the lease.

The claim that I-occupancy is a condition precedent to the lease has no support in the findings of fact. But even if it is found to be such a condition, it was not achieved because of the failure of CPSS, and <u>not</u> because CUA breached the agreement. CPSS, and not CUA, corresponded with the State of Utah as part of the certification process. CPSS was required to complete an application process for I-occupancy certification. This required submitting an application, a $1,500 fee and preparing a "narrative". Although requested to do so on many occasions, CPSS failed to submit the application, narrative and fee to the State of Utah.

Any failure to obtain I-occupancy was the fault of CPSS. I-occupancy is not a condition precedent to the lease.

CPSS also claims that commencement of the lease is an unfulfilled condition precedent. As found by the court, there was

a valid certificate of occupancy for the leased premises when the lease term started. Under the printed lease commencement provisions (Section 2 of Ex. 11), the lease commenced as of December 1, 1988.

CPSS also ignores specific typed-in language that provides for commencement of the lease on December 1, 1988. The law is clear that typed words take precedence over printed words. It is well settled that when part of a contract is typed and part is printed, and the printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing or typing will control. 17 Am.Jur. 2d, "Contracts" Section 395, p. 421 (1991), citing Holland vs. Brown, 15 Utah 2d 422, 394 P.2d 77 (1964). The Holland case states that:

> Where there is a printed form of contract, and other words are inserted, in writing or otherwise, it is to be assumed that they take precedence over the printed matter. 15 Utah 2d at 245.

Although Section 2 says in print that the lease term commences 15 days after a fitness of occupancy permit or commencing to do business, the typed words say "LEASE TERM: Dec. 1, 1988 to Nov. 30, 1993." Section 3 (Rent) and Exhibit "E" to the lease say that rent is to be paid from December 1, 1988 through November 30, 1993 (page 16, top). CPSS was aware that the lease term commenced on December 1, 1988.

On looking at the entire lease contract as a whole as required by Mark Steel Corporation vs. Eimco Corporation, 548 P.2d 892 (Utah 1976), in order to give an objective and reasonable construction to

the lease, it is clear that the lease term commenced December 1, 1988, and commencement is not an unfulfilled condition precedent.

CPSS claims that the signatures of CPSS is also a condition precedent, and that it never intended to be bound by the lease until other conditions were met. A party's actions and performance are evidence of that party's true intentions. Plateau Mining Co. vs. Utah Division of State Lands, 802 P.2d 720 (Utah 1990). As stated above, CPSS' actions and performance can support only one intent: CPSS intended to be bound by the lease.

CPSS claims that occupancy shortly after Thanksgiving was a condition precedent. As discussed above, CPSS did take possession of the premises on or about December 1st (which is shortly after Thanksgiving) to the exclusion of any other prospective tenants, and commenced demolition of a significant portion of the premises. CPSS could have taken immediate occupancy of the U-Care medical and surgical operatory area if it desired. CPSS never complained to its contractor when, in a letter dated November 14, 1988, TCM told CPSS that construction of the buildout would not be completed until about February 28, 1989. Obviously occupancy shortly after Thanksgiving was not an unfulfilled condition.

CPSS also claims that a condition precedent was a buildout cost of $44.00 per square foot. This claim is not supported by the findings. A buildout cost is never mentioned in the lease. A $44.00 figure was mentioned by CPSS' Lee Teerlink merely to compare the relative benefits and disadvantages of two different buildings in which CPSS had an interest. The August 24, 1988, letter from

the lease agent to CPSS did not in any way guarantee a buildout cost of $44.00 per square foot, and could not bind CUA even if it did contain such a guarantee.

Additionally, prior to execution of the lease, the architect, Bill Nelson, told CPSS that buildout costs would be in the $80.00 per square foot range, even though CPSS had not yet determined the type of occupancy it desired.

CPSS' claim in its brief that it could not afford the buildout costs is not supported by the facts. Valley Bank & Trust issued a loan commitment to CPSS in the amount of $300,000 for the purpose of financing leasehold improvements to the CUA premises. This is well above the $284,523 bid amount for construction costs which, incidentally, gives a total cost of $38.98 per square foot of nearly 7,300 square feet of medical space, including two I-occupancy surgical rooms. The $44.00 per square foot claim is not a condition precedent to the lease.

The alleged conditions precedent to the validity of the lease agreement are either not conditions precedent at all, or have been fully complied with by CUA.

V. UNCONDITIONAL AND ABSOLUTE GUARANTEES

In the case of Kintner vs. Wolfe, 102 Ariz 164,426 P.2d 798 (1967), the Arizona Supreme Court held that although a promise is called a guarantee by the parties, it is not conclusive evidence that the promise is not original. In Kintner, a "lease and guarantee" instrument whereby the guarantor agreed to guarantee payment of rent to the lessor over a ten-year period without

respect to future changes and conditions was held to be an unconditional promise by the guarantor and created a primary obligation of the guarantor. 426 P.2d at 801.

There is no conditional language on the guarantee of the doctors (except for the term of the guarantee, which is not at issue here). Where, as here, the guarantees are absolute and unconditional, the doctors are liable as primary obligors under the lease agreement. This is especially so where the court found that the doctors intended to be bound by the terms of the lease agreement. At any rate, where the principal obligor breaches the lease, the guarantors' obligation is to perform the lease. REST. OF SURETYSHIP, Sec. 12 (Tentative Draft No. 1, dated March 23, 1992).

VI. MUTUAL ASSENT OF PARTIES

CPSS claims in its brief that it never assented in any form to the lease. Contrary to this claim, CPSS through its president John L. Clayton executed a lease agreement, Ex 4, which was identical in provisions to the lease signed by the guarantors. Ex. 11. Then, as set forth above, CPSS by its every action confirmed its intent to be bound by the lease. Its acts are undisputed. The court below could only conclude that CPSS consented to the lease.

CPSS also claims there was no meeting of the minds as to certain terms of the lease, including identification of the lessee, what would happen if bids came back high, and whether a month-to-month tenancy was created.

The lessee is clearly identified on the lease documents as

CPSS. The doctors are clearly identified as unconditional guarantors. CPSS fully intended to be bound by the lease. The doctors intended to be bound by the terms of the lease agreement. TSL acknowledged his obligation under the lease agreement. There is no question as to the identity of the parties.

There is no mention in the lease document (Ex. 11) of the buildout costs to CPSS. The buildout was totally under the control of CPSS, and depended on what type of buildout and what changes the doctors desired. Buildout costs were never intended to be a part of the lease.

There is no mention in any lease document or any other correspondence that this tenancy would be a month-to-month tenancy. To even think so is far-fetched. CPSS demolished a substantial portion of the CUA building. Rebuilding the demolished portion into office space after CPSS breached the lease cost CUA in excess of $54,000. CPSS obviously intended to spend significant sums to build out the demolished space. It contracted with an architect, let out bids totalling over $284,000, and obtained a bank loan for $300,000 to pay the construction costs. One cannot reasonably think to spend nearly $300,000 for a buildout (as well as purchase new letterhead, etc.) knowing that on a very short notice the landlord could require that tenant leave because there was only a month-to-month tenancy.

There is no provision in the lease agreement that it is a month-to-month tenancy. It provides for a lease term running from "Dec. 1, 1988 to Nov. 30, 1993." The agreement is called a

"lease". The parties are "lessor" and "lessee", and not "landlord" and "tenant". The term is "for a period of five (5) years." (Section 2). Section 3 (Rent) talks about the various "years" of the lease. Exhibit E obligates CPSS to pay rent through November 30, 1993, and not just for one month. Additional rent (Section 9) is based on an annual consideration of building expenses. Exhibit B, paragraph D gave CPSS an option to extend the lease not for an additional month, but for two successive terms of three years each. The language of the lease clearly shows it is for a term of years and not a month-to-month tenancy.

In the Jaramillo vs. Farmers Insurance Group, 669 P.2d 1231 (Utah 1983) case, the Utah Supreme Court stated:

> It is well established in the law that unexpressed intentions do not affect the validity of a contract....The apparent mutual assent of the parties...must be gathered by the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of its words and acts. 669 P.2d at 1233.

CPSS never expressed intentions to CUA regarding I-occupancy, month-to-month tenancies or buildout costs. CPSS cannot now say that its unexpressed intentions should control the case.

VII. LEASE NEITHER IMPOSSIBLE TO PERFORM NOR FRUSTRATED IN PURPOSE

CPSS seeks to be relieved from the lease agreement because of the doctrine of impossibility of performance, claiming I-certification was impossible or impracticable.

> Under the contractual defense of impossibility, an obligation is deemed discharged if an unforeseen event occurs after

> formation of a contract without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable. Western Properties vs. Southern Utah Aviation, 776 P.2d 656,658 (Ut. App. 1989).

In Western Properties, Western subleased land to Southern Utah Aviation. Southern Utah applied unsuccessfully for site plan approval from Cedar City to build a building on the land. Western sued on the lease for nonpayment and Southern Utah claimed impossibility of performance. The trial court found that Southern Utah made every effort that could reasonably be required in order to induce the City to give its approval, and that performance was impossible through no fault of Southern Utah. This court held that the inability to obtain approval for the construction thwarted the lease and that the duty to construct the building was discharged.

However, this court also held that occupancy of the land pursuant to the lease was not precluded by inability to construct the building. Defendants could have continued to pay rent. See especially footnote 8, 776 P.2d at 659, where the Court recognized that at common law the application of the usual contract defenses to a covenant to pay rent was limited.

In this case, unlike the defendants in Western Properties, CPSS did not make "every reasonable effort that could reasonably be required," and the cost of the buildout to obtain I-certification was not unforeseen.

Before the lease was signed, CPSS knew the approximate cost to complete the buildout. CPSS even took out a loan to cover the construction costs, and had money available in excess of the

construction bids. CPSS knew before the lease term started that, assuming all went well, construction would not be completed until the end of February, 1989, at the earliest. The cost of I-occupancy and the time to construct it were known well in advance.

In addition, CPSS failed to take the necessary steps to obtain I-certification. It never submitted a narrative or application form, and never paid the application fee.

The trial court also found that I-occupancy certification was not impossible or impractical, but that it was very likely that such certification could be obtained for the leased premises. The court further found that this type of certifcation in an existing building is not unusual. It is physically possible to convert a portion of the CUA premises to I-occupancy by creating a fire-protected "bubble" within the building. The State of Utah gave tentative approval to the plans.

Where I-occupancy certification was never a condition of the lease, and where CPSS controlled construction and the certification process through its own architect and contractor, it cannot now argue that performance is impossible, especially since it could have moved into the premises immediately and started its plastic surgery business in the certified medical offices and surgical operatory areas.

Performance of the lease was not frustrated. The trial court's findings are based on the testimony of CPSS' own architect Bill Nelson that not only was I-occupancy certification posssible, but very likely, and that he had seen it done several times under

circumstances similar to the CUA building.

In Quagliana vs. Exquisite Home Builders, Inc., 538 P.2d 301 (Utah 1975), the Supreme Court held that in order to obtain relief through the frustration of purpose doctrine, a party must be without fault in causing the frustration. 538 P.2d at 305. CPSS failed to submit the required application form, failed to pay the required fee, and failed to complete the required narrative. CPSS is not without fault and cannot rely on this defense.

VIII. PAROLE EVIDENCE PROPERLY ADMITTED

CPSS claims that the court improperly admitted parole evidence. But CPSS has not identified the parole evidence it claims was improperly admitted.

Parole evidence is admissible in an action to reform a lease in order to show the parties' intentions. Maytime Manor, Inc. vs. Stokermatic, Inc., 597 P.2d 866 (Utah 1979). Here, in the action to reform the lease to add the signature of CPSS to the lease, evidence was admitted to show that CPSS intended to be the lessee, and that CPSS partially performed the lease.

The Supreme Court has also held that evidence is not parole evidence and is admissible where it does not contradict the writing, but merely explains the transaction. Zeese vs. Estate of Siegel, P.2d 85,88 (Utah 1975).

No parole evidence needed to be admitted to establish the lease. The lease was not ambiguous merely because CPSS stated it was ambiguous. Contract terms are not necessarily ambiguous simply because one party seeks to endow them with a different meaning then

that relied on by the drafter. Buehner Block Company vs. UWC Associates, 552 P.2d 892, 895 (Utah 1988). CPSS has shown no ambiguities in the lease. The parties, term and purpose of the lease are clear. The commencement date is plainly stated. There are no warranties of I-occupancy certification or time or cost of the buildout.

Evidence was submitted to explain the transaction between the parties. Such evidence is not parole evidence. Evidence was admitted to show the true intentions of the parties in order to reform the lease to add the signature of CPSS. Such evidence is admissible, and the trial court did not err in allowing it.

IX. REFORMATION PROPER TO ADD SIGNATURE

The Court of Appeals in Grahn vs. Gregory, 800 P.2d 320 (Ut.App. 1990) has held that reformation is "appropriate where the written instrument is not in conformity with the parties' agreement," or where it is necessary to "reflect the intent of the parties." 800 P.2d at 325.

The facts cited above clearly show that CPSS not only intended to be bound as the lessee under the lease agreement, but also acted as though the lease was binding on it. The lease agreement itself (Ex. 11) lists the lessee as CPSS and provides a signature space for CPSS to sign. CPSS in fact made the lease payments called for in Exhibit 11. As found in the trial court's Conclusions of Law ("CL"), the lease should be reformed so that CPSS signs it. This would make the lease conform to the parties' agreement and reflect the true intent of the parties.

CPSS has not briefed this issue on appeal. Generally, where an appellant fails to brief an issue on appeal, the point is waived. Pixton vs. State Farm Mutual Automobile Ins. Co., 809 P.2d 746,751 (Ut. App. 1991). Where a claim of error regarding reformation is waived, it is deemed to be affirmed on appeal, and CPSS is estopped from claiming the lease should not be reformed to add the signature of CPSS.

IX. CPSS ESTOPPED FROM DENYING LEASE

The trial court in its conclusions of law held that CPSS is estopped from denying the validity of the lease agreement. See CL 19,20,21. CPSS has not briefed this issue in its appeal brief except to say that equitable relief is not available to CUA. Where CPSS did not brief the estoppel issue, the issue was not presented for appellate review.

Estoppel requires three elements: (1) a statement, admission or act, or failure to act, by one party inconsistent with a later-asserted claim; (2) the other party's reasonable action or inaction based on the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate its statement, admission, act or failure to act. Brixon & Christopher Architects vs. Elton, 777 P.2d 1039 (Ut.App. 1989).

CPSS performed a series of acts and made statements inconsistent with its later claim that the lease was invalid. CPSS had been told by the lease agent Lee Teerlink and by CUA's property manager Blaine Savage that CUA would need to release paying tenants

with long-term leases in order for CPSS to have the space it desired in the CUA building. CPSS paid the initial month's lease payment as required by the written lease agreement. CPSS submitted a lease agreement executed by the doctors, two of whom are officers and directors of CPSS. CUA knew that CPSS had hired an architect to design and a contractor to construct a modification in the leased premises. CPSS had keys to the leased premises. TSL called Mr. Savage the day after the signed lease was delivered to CUA and expressed appreciation that the lease negotiations had been completed. These words and actions can only suggest that CPSS intended and believed the lease was valid.

Based on the above words and actions of CPSS, CUA reasonably released tenants. The lease payments released by CUA total $196,000. This fact satisfies the second requirement for estoppel.

CUA clearly will suffer damages in the sum of $196,000 if CPSS is allowed to repudiate its acts and words showing the lease is invalid. This testimony was unrebutted at trial.

Based on these facts, CUA has proved that CPSS should be estopped under the Brixon test from denying the validity of the lease agreement and is bound by its terms.

XI. DAMAGES

CPSS presented no evidence that CUA breached the lease agreement, and the trial court so found. (CL 28, FF 64) If CPSS, suffered any damages at all, it was due to CPSS' own acts or omissions.

Even if CUA did breach the lease, CPSS proved no damages. Its

expert Art Dummer's testimony was based on assumptions shown to be without basis. Damage calculations were based on I-occupancy, which assumption is speculative at best. CPSS never operated an I-occupancy surgery center before. The assumed overhead expenses were based on unrelated hospital overhead expenses, not on CPSS actual expenses. Irrelevant evidence is not admissible. URE 402. Mr. Dummer never calculated income taxes, increased rentals, equipment or utility expenses in determining net profit. He did not calculate the fact that TSL left CPSS and took many CPSS patients with him. His testimony actually proved no damages for CPSS. CPSS' testimony on alleged damages was not given based on personal knowledge and was properly rejected by the trial court. URE 602. Evidence of these highly speculative damages was properly excluded by the trial court, and not considered in entering its judgment.

CUA, on the otherhand, submitted substantial unrebutted evidence to support its claims for damages and fees. Those damages total $242,533.56 plus $49,781.50 in attorney's fees as of the time of trial. CPSS neither objected to CUA's damage evidence at trial nor in its brief on appeal, and the judgment in favor of CUA should be affirmed.

In addition, where the lease agreement gives CUA a claim for attorney's fees CUA should be awarded a judgment against CPSS (including the doctors) for all attorney's fees and costs incurred since the last date of the trial.

CONCLUSION

The evidence clearly preponderates in favor of CUA's position that CPSS intended to be bound by the lease agreement, believed it was bound by the lease, and acted as though it was bound by the lease agreement until the business broke up in the spring of 1989. In good faith and reasonable reliance on the words and acts of CPSS, CUA released rent-paying tenants in order to allow CPSS to become lessee. This court should affirm the decision of the trial court that the lease has been ratified by CPSS, that no conditions precedent prevent enforcement of the lease, that the guarantors are absolutely and unconditionally bound by the lease, that there was mutual assent to the lease, that the lease was possible to perform, that CPSS should execute the lease, that CPSS is estopped from denying the lease, and that parole evidence was properly admitted, and that CUA has not breached the lease agreement.

The judgment of the trial court should be affirmed in full, CUA should be awarded its costs on appeal, and CUA should be awarded a reasonable attorney's fee expended since the trial in this matter.

DATED this _____ day of August, 1992.

STEVEN G. JOHNSON
Attorney for Appellee
Commercial Union Associates

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the _____ day of August, 1992, I

personally hand-delivered four (4) true and correct copies of the above Appellee's Brief to the office of B. Ray Zoll, Zoll & Branch, 5300 South 360 West, Suite 360, Salt Lake City, Utah 84123.

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